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In the Supreme Court of the United States

OCTOBER TERM, 1978

FRANK W. SNEPP, III, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 18a-50a) is reported at 595 F. 2d 926. The opinion of the district court (Pet. App. 1a-14a) is reported at 456 F. Supp. 176.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1979. The petition for a writ of certiorari was filed on June 18, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the courts below properly enforced a contract in which petitioner, as a condition of his employment with the Central Intelligence Agency, agreed not to publish "any information or material relating to the Agency, its activities or intelligence activities generally," without specific prior approval by the Agency.

2. Whether punitive damages may be assessed against a former Central Intelligence Agency employee who "willfully, deliberately and surreptitiously" and "for personal financial gain" breached a contractual secrecy agreement by publishing information concerning the Agency without first submitting the material to the Agency for review.

STATEMENT

From September 1968 through January 1976, petitioner was employed by the Central Intelligence Agency in a capacity that granted him frequent access to classified information (Pet. App. 3a-4a, 20a-22a). Before beginning his employment with the Agency, petitioner signed a secrecy agreement in which he acknowledged that he would occupy "a position of trust in the Agency of the Government responsible to the President and the National Security Council for intelligence relating to the security of the United States" (*id.* at 3a, 58a). As a condition of employment, petitioner promised "not to disclose any classified information relating to the Agency without proper authorization" (id. at 58a). He further promised that, before revealing any information concerning the Agency, he would obtain the Agency's decision on "whether or not information is classified and if so, who is authorized to receive it" (*id.* at 59a). Finally, petitioner agreed "not to publish or participate in the publication of any information or material relating to the Agency, its activities or intelligence activities generally, either during or after the term of [his] employment by the Agency without specific prior approval by the Agency" (*ibid.*).[1]

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[1]When petitioner ended his association with the Agency in 1976, he signed a document entitled "Termination Secrecy Agreement" in which he stated (Pet. App. 61a):

> I will never divulge, publish, or reveal by writing, word, conduct, or otherwise any classified information, or any information concerning intelligence or CIA that has not been made public by CIA, to any unauthorized person including, but not limited to, any future governmental or private employer or official without the express written consent of the Director of Central Intelligence or his representative.

At the time he signed this agreement, petitioner was advised that it imposed the same responsibilities as those he had accepted under the 1968 agreement (*id.* at 9a, 22a).

During the course of his employment with the Agency, petitioner served two tours of duty in South Vietnam (Pet. App. 4a). He was there from June 1969 to June 1971 and again from October 1972 to April 1975 (*ibid.*). The latter period included the American withdrawal from Vietnam and the end of the Agency's operations in that country (*id.* at 21a). Allegedly because he was dissatisfied with the Agency's conduct of these affairs, petitioner decided to write a book on the subject (*ibid.*). Although he apparently did not conceal the fact that he was preparing a manuscript based on his experiences in Vietnam, petitioner kept his negotiations with a publisher secret (*id.* at 5a-6a, 22a). On a number of occasions, he assured Agency officials (including the Director of Central Intelligence) that he would submit his manuscript for pre-publication review, in accordance with the agreement he had signed when he began working for the Agency (*id.* at 5a-6a, 22a-23a). Contrary to his secrecy agreement and these assurances, however, petitioner did not submit his manuscript for review but caused it to be published in November 1977 without approval from the Agency (*id.* at 4a, 6a, 23a). The book was entitled *Decent Interval.*

In February 1978, the government filed this suit in the United States District Court for the Eastern District of Virginia. The complaint (Pet. App. 51a-57a) alleged that petitioner breached his contractual and fiduciary duties to

the Agency by permitting his manuscript to be published without submitting it for pre-publication review (*id.* at 55a). As a consequence, the complaint stated, petitioner had undermined confidence and trust in the Agency and had hampered the Agency's ability to perform its statutory duties (*ibid.*). The complaint sought a declaration that petitioner had violated his contractual and fiduciary obligations to the Agency and an injunction against future violations. The complaint also sought damages for the harm suffered by the Agency and imposition of a constructive trust over all gains derived by petitioner from the publication, sale, and other distribution of *Decent Interval* (*id.* at 56a). The complaint did not allege that petitioner had published classified information but sought only to enforce the Agency's contractual right to review the manuscript to determine whether it contained such information.

Following a non-jury trial, the district court found petitioner liable for breach of contract and granted the relief requested (Pet. App. 1a-17a). Relying on *United States* v. *Marchetti*, 466 F. 2d 1309 (4th Cir.), cert. denied, 409 U.S. 1063 (1972), the court sustained the validity of the 1968 secrecy agreement and enjoined petitioner from publishing information relating to the Agency and its intelligence activities without first submitting such material to the Agency for review (Pet. App. 16a-17a). The court also imposed a constructive trust, for the benefit of the United States, over all revenues derived by petitioner from the publication and sale of *Decent Interval* (*id.* at 15a).

The court of appeals affirmed the district court's ruling with respect to the validity of the secrecy agreement and petitioner's breach thereof (Pet. App. 19a-31a). The court also upheld the award of injunctive relief requiring petitioner to submit any future manuscripts within the agreement for pre-publication review (*id.* at 31a-32a). The court declined, however, to approve the imposition of a

constructive trust over petitioner's earnings from the publication of *Decent Interval* (*id.* at 33a-35a). The court explained that its conclusion would have been different had the government alleged and proved that petitioner published classified material without proper authorization. But, in the absence of such proof, the court refused to find that the 1968 agreement created a "fiduciary relationship to submit writings for prepublication review" (*id.* at 34a). Without such a relationship, the court held, the equitable remedy of a constructive trust was inappropriate.

The court of appeals concluded (Pet. App. 36a-39a), however, that, on a proper factual showing, the government would be entitled to recover punitive damages from petitioner. Although the court acknowledged that punitive damages ordinarily are not recoverable for breach of contract (*id.* at 36a), it stated that the evidence at trial, viewed in the light most favorable to the government, was sufficient to permit a trier of fact to find that petitioner had falsely represented to Agency officials that he would comply with his contractual obligation to submit his manuscript for pre-publication review and that the Agency had relied on these false representations in determining not to take legal action to enjoin the publication of *Decent Interval* (*id.* at 36a-37a). Under these circumstances, the court held, petitioner's breach of contract may also have embraced the tort of deceit, for which punitive damages may properly be assessed (*id.* at 37a).

The court ruled that the amount of punitive damages that the government may recover does not bear any necessary relationship to the amount of compensatory damages that can be proved, but rather should depend on petitioner's culpability and financial circumstances (Pet. App. at 38a). It therefore remanded for a jury trial on

these disputed factual issues and, in the event those issues are resolved favorably to the government, for a jury determination of the amount of punitive damages that should be awarded (*id.* at 39a).

Judge Hoffman dissented in part (Pet. App. 40a-50a). He agreed with the finding of liability and the grant of injunctive relief but disagreed with the majority's discussion of punitive damages. In Judge Hoffman's view, the 1968 secrecy agreement did establish a fiduciary relationship by virtue of its requirement that *all* material relating to the Agency, be submitted for pre-publication review. In light of the government's conceded difficulty in proving compensatory damages, Judge Hoffman concluded that imposition of a constructive trust over petitioner's gains from *Decent Interval* was an appropriate remedy. He therefore would have affirmed the district court's judgment in its entirety.

ARGUMENT

1. Petitioner challenges the validity of the 1968 secrecy agreement on two grounds. First, he maintains (Pet. 9-10) that the agreement, and its judicial enforcement, lack the statutory authorization that is necessary to support any restriction on the First Amendment rights of government employees. Second, he contends (Pet. 11) that public employment may not be conditioned on a waiver of First Amendment rights. Neither argument merits review by this Court.

a. Petitioner's complaint about the lack of statutory authority for the agreement he signed in 1968 ignores 50 U.S.C. 403(d)(3), which expressly states that "the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure." In the exercise of this responsibility, the

Director may prescribe reasonable requirements designed to safeguard against the improper release of classified information. One such measure is the requirement that all Agency employees agree not to publish information concerning the Agency's activities or intelligence sources and methods generally, without first submitting such materials to the Agency for review. By examining these materials before publication, the Director may prevent the unauthorized disclosure of classified information and thereby protect "intelligence sources and methods."[2]

Under 28 U.S.C. 1345, the federal district courts have "original jurisdiction of all civil actions, suits or proceedings commenced by the United States * * *." And, as this Court stated in *Wyandotte Co.* v. *United States*, 389 U.S. 191, 201 (1967), "the United States may sue to protect its interests," including its proprietary or contractual rights. Accordingly, there can be no serious question about the district court's statutory authority to entertain the government's complaint for breach of contract and to award injunctive and monetary relief in accordance with governing remedial principles.

b. The Agency's requirement that prospective employees agree to a pre-publication review procedure

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[2]Executive Order No. 12065, 43 Fed. Reg. 28949, 28950-28951 (1978), restricts classification authority to actively employed government officials. Moreover, the Director and other Agency supervisory officials are the persons best suited to determine whether particular items of information are classified. Certainly they are better situated to make such decisions than persons who have already left the Agency's employ and therefore may be unaware of changed circumstances that critically affect the significance of certain public disclosures. As the court of appeals recognized in *United States* v. *Marchetti*, 466 F. 2d 1309, 1318 (4th Cir.), cert. denied, 409 U.S. 1063 (1972): "What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context."

before they receive access to classified information does not violate the First Amendment. While "unreasonable" conditions may not be attached to public employment (*Keyishian* v. *Board of Regents*, 385 U.S. 589, 605-606 (1967)), a public employee may be subjected to greater restraints than ordinary citizens. As this Court has observed in an analogous context:

> the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

Pickering v. *Board of Education*, 391 U.S. 563, 568 (1968).[3]

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[3]In *Civil Service Commission* v. *Letter Carriers*, 413 U.S. 548 (1973), and *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947), the Court held that a variety of legitimate government goals—the impartial execution of the federal laws, the prevention of the use of a large, publicly paid work force for political purposes, and the preservation of a merit system of Civil Service employment—justify the incidental restrictions that the Hatch Act, 5 U.S.C. 7324(a)(2), imposes on the First Amendment rights of public employees. (The Hatch Act has consistently been interpreted to prohibit government employees from publishing any letter or article supporting or opposing any political party or candidate. See 413 U.S. at 579-580; 5 C.F.R. 733.122(b)(10), (12).) Likewise, in *Buckley* v. *Valeo*, 424 U.S. 1, 25 (1976), the Court observed that even a significant interference with protected rights of political association "may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." See also *Dunn* v. *Blumstein*, 405 U.S. 330, 336 (1972); *Kramer* v. *Union Free School District*, 395 U.S. 621, 627 (1969); *NAACP* v. *Button*, 371 U.S. 415, 438 (1963); *NAACP* v. *Alabama, ex rel. Patterson*, 357 U.S. 449, 463 (1958).

The Central Intelligence Agency, whose principal function concerns the most sensitive and confidential matters regarding the national defense and the Executive's conduct of foreign policy, "has interests as an employer" that differ "significantly from those it possesses in connection with regulation of the speech of the citizenry in general." Those interests justify the conditioning of employment on a promise by the employee not to make unauthorized disclosure of classified information that comes into his possession as a result of his employment. See *United States* v. *Marchetti*, *supra*, 466 F. 2d at 1316-1317 (secrecy agreements "are entirely appropriate to a program in implementation of the congressional direction" prohibiting the unauthorized disclosure of intelligence sources and methods).

By the same token, employment may properly be conditioned on a promise that intelligence-related materials intended for publication will be submitted first to the Agency for review. Only in this way can the Agency hope to prevent the compromise of important governmental functions that would result if classified information were revealed. The burden on an employee's First Amendment rights is small; under the district court's decision (Pet. App. 17a), the Agency must complete its review of submitted materials within 30 days and must approve the publication of all nonclassified material. The minimal restrictions imposed by the secrecy agreement that petitioner signed in 1968 are amply justified by the risk of substantial harm to the national interest that would be created by the unauthorized disclosure of classified information obtained by an Agency employee in the course of his employment.

2. Relying upon his submission that the Agency may not constitutionally require its employees to submit intelligence-related materials for pre-publication review,

petitioner contends (Pet. 7-9) that the district court imposed an unlawful "prior restraint" when it permanently enjoined him from "further breaching the terms and conditions of [his] Secrecy Agreement" (Pet. App. 16a). Petitioner does not suggest that the prospects of a future violation of the agreement are so remote as to make injunctive relief inappropriate. Rather, he maintains that, by enjoining him to abide by the terms of his contract, the district court has impermissibly infringed his First Amendment right to publish unclassified information without observing the restrictions to which he agreed in 1968.

This argument fails because its premise is faulty. As noted above, the First Amendment does not preclude the Agency from insisting that its prospective employees agree to the pre-publication review procedure. Requiring petitioner to comply with a valid contract he knowingly entered into also does not abridge his First Amendment rights.

Courts frequently grant specific performance in contract actions where money damages cannot adequately remedy a breach. See *Restatement of Contracts* §358 (1932). This is particularly so in the enforcement of "negative promises," *i.e.*, promises to refrain from certain conduct altogether or to refrain from such conduct unless some specified prior condition is met. 5A *Corbin on Contracts* §§1205-1209 (1964). Here, petitioner voluntarily agreed not to publish any manuscripts concerning intelligence activities without permitting the Agency to review them in advance to determine if they contained classified information. Under traditional equitable principles, the government is entitled to injunctive relief to

guard against petitioner's threatened future violations of this agreement.[4]

3. Finally, petitioner contends (Pet. 13-15) that the court of appeals erred in permitting the government to recover punitive damages if it could show that he falsely led the Agency to believe he would comply with his contractual obligations and that the Agency relied on his misrepresentations. Petitioner argues that the availability of damages in cases touching on the First Amendment must be carefully limited and that permitting a jury to award punitive damages in this case would be tantamount to giving jurors the power to punish the expression of unpopular ideas.

The first answer to this contention, of course, is that no punitive damages have yet been assessed against petitioner. If such damages are awarded after a jury trial

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[4]Petitioner asserts (Pet. 11-12) that the pre-publication review requirements of the 1968 secrecy agreement are no longer binding, because the agreement was impliedly repealed by the termination secrecy agreement he signed in 1976 when he left the Agency's employ (see note 1, *supra*). This question of contract interpretation turns on the particular agreements involved in this case and does not warrant the Court's attention. In any event, the argument was properly rejected by the courts below (Pet. App. 8a-9a, 24a-27a). Contrary to petitioner's contention, the 1976 agreement continues in effect the broad pre-publication review requirements of the 1968 agreement. The 1976 agreement (*id.* at 61a) prohibits the publication of "any classified information, or any information concerning intelligence or CIA that has not been made public by CIA, to any unauthorized person * * * without the express written consent of the Director of Central Intelligence or his representative." In *United States* v. *Marchetti*, *supra*, the court of appeals held that an agreement with similar language required that all writings concerning the Agency, not only writings that disclosed classified information, be submitted for pre-publication review. Any other interpretation would place the responsibility for protecting "intelligence sources and methods from unauthorized disclosure" in the hands of former Agency employees, rather than the Director of Central Intelligence.

on remand, petitioner may then seek review of the propriety of that relief. Until that time, however, review by this Court is not warranted. See *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 398 U.S. 327 (1967).

In any event, the court of appeals' endorsement of a punitive damages recovery on a proper factual showing was correct and will not give rise to the danger that petitioner imagines. The court of appeals found that the evidence introduced by the government was sufficient to permit a trier of fact to conclude that petitioner "willfully, deliberately, and surreptitiously" breached the 1968 secrecy agreement and that he did so in a manner specifically designed to mislead the Agency. Where a breach of contract involves conduct that is malicious, deceitful, taken in bad faith, or in reckless disregard for the rights of others, courts often permit the injured party to collect punitive damages in order to punish the wrongdoer and to deter such conduct in others. *Singleton* v. *Foreman*, 435 F. 2d 962 (5th Cir. 1970); *Material Handling Industries, Inc.* v. *Eaton Corp.*, 391 F. Supp. 977, 981 (E.D. Va. 1975); *Sims* v. *Western Steel Co.*, 403 F. Supp. 450, 454 (D. Utah 1975); *Southern National Bank of Houston* v. *Tri Financial Corp.*, 317 F. Supp. 1173 (S.D. Tex. 1970); *Mid South Cotton Growers Association* v. *Woods*, 380 F. Supp. 429, 431 (N.D. Miss. 1974); *Stamatiou* v. *United States Gypsum Co.*, 400 F. Supp. 431, 440 n.6 (N.D. Ill. 1975), aff'd, 534 F. 2d 330 (7th Cir. 1976); *Hoche Productions, S.A.* v. *Jayark Films Corp.*, 256 F. Supp. 291, 296 (S.D.N.Y. 1966).

The court of appeals in the present case concluded that effective enforcement of the Agency's secrecy agreement requires the availability of punitive damages, at least in situations where an employee deceitfully persuades the Agency not to take legal action to block the publication

of a manuscript that has not been submitted for review (see Pet. App. 36a-38a). This conclusion was a reasonable one, and the factual showing required as a precondition for recovery ensures that juries will not simply punish the expression of unpopular ideas.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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